December 2004

Update: Child Protective Proceedings Benchbook (Revised Edition)

CHAPTER 4

Jurisdiction, Venue, & Transfer

4.11 Case Law Defining "Unfit Home Environment"

On page 101, insert the following case summary immediately before Section 4.12:

A criminal conviction is not a prerequisite to the court's assumption of jurisdiction on grounds that a parent's "criminality" renders a child's home environment unfit. *In re Unger*, ___ Mich App ___, ___ (2004). In *Unger*, the respondent-father is suspected of murdering his wife, the mother of their two children, but had not been charged with or convicted of the murder at the time a petition was filed in a child protective proceeding. The Court of Appeals held that proving "criminality" did not require a prior "conviction": the petitioner must only demonstrate that the "respondent engaged in criminal behavior by a preponderance of the evidence." *Id*. at ___.

The respondent-father in *Unger* also argued that a finding of criminality based upon the death of the children's mother, in the absence of a criminal conviction, violated his due process rights. The trial court agreed with the respondent-father and prohibited the petitioner from introducing evidence of the alleged murder at the trial. On appeal, the Court of Appeals indicated that during the adjudicative phase of child protective proceedings the parent's liberty interest at stake is the interest in managing his children and the governmental interest at stake is the child's welfare. The Court of Appeals overturned the trial court's findings and stated:

> "Rather than appropriately balancing the factors stated in *Mathews* [*v Eldridge*, 424 US 319, 335 (1976)], the trial court focused on the harm the children would suffer if deprived of their father and the potential bias respondent might incur in the subsequent criminal proceedings. As stated above, however, the children's interest in maintaining a relationship with their father exists only to the extent that it would not be harmful to them. [*In re*] *Brock*, [442 Mich 101, 113 n 19 (1993)]. Their welfare is of utmost

> importance in these proceedings, *Id*. at 115, and due process is not offended by determining whether the trial court has jurisdiction to decide whether their relationship with their father should continue. Procedural due process seeks to protect them from an *erroneous* termination of their relationship with their father, not a statutorily proper termination. See *Brock, supra* at 113." *Unger, supra* at ___.

The Court of Appeals indicated that the trial court provided no specific reason for excluding evidence of the murder, suggesting only that evidence of the murder would violate the respondent's due process rights. The Court of Appeals reversed and stated "whether respondent killed [the children's mother] is highly relevant to the issue whether 'criminality' renders the children's home or environment unfit." *Id.* at ___.

CHAPTER 4

Jurisdiction, Venue, & Transfer

4.12 Court's Authority to Take Jurisdiction Over a Child Following the Appointment of a Guardian

On page 104, after the **Note** at the top of the page, insert the following text:

In *In re Zimmerman,* ___ Mich App ___ (2004), FIA filed a petition and a request to place one of respondent-mother's children, Kaleb, in protective custody. The petition alleged that the conditions leading to the prior filing of a neglect petition concerning respondent's other two children had not been rectified. The parties agreed to participate in Kent County's Kinship Program.* Under the program, respondent consented to the filing of the petition with the understanding that Kaleb would be placed with the child's paternal grandmother and a guardianship would be established. The parties agreed to a "family plan," similar to a case service plan, and, following establishment of the guardianship, FIA requested that the neglect petition concerning Kaleb be dismissed. A similar procedure was used under the program regarding one of respondent's other children, Brendan. The court dismissed both petitions concerning these two children, but respondent failed to comply with the family plan in both cases, and the guardians filed supplemental petitions requesting termination of parental rights.

*See Section 8.2 for a brief description of this program.

On appeal, respondent argued that the referee erred in finding that the court had jurisdiction under MCL 712A.2. Respondent contended that no grounds for jurisdiction existed because the neglect petitions regarding the two children had been dismissed after the guardianships were established, and placement with the guardians meant that the children were not "without proper custody or guardianship" under MCL 712A.2(b)(1)(b).* The Court of Appeals rejected these arguments, noting that although the original neglect petitions had been dismissed, respondent was still subject to the requirements of the family plan and substantially failed to comply with those requirements. Thus, the Court concluded, jurisdiction was proper under MCL 712A.2(b)(4).

*See Section 4.10, above, for discussion of this statutory provision.

CHAPTER 4

Jurisdiction, Venue, & Transfer

4.20 Transfer of Case to County of Residence

Insert the following text at the top of page 116 immediately before "**Bifurcated proceedings"**:

In *In re Zimmerman,* ___ Mich App ___ (2004), FIA filed a petition in Kent County, where both respondent-parent and child resided and the alleged neglect occurred. After the child was placed in a guardianship with a relative in Isabella County, the court dismissed the petition. When the parent failed to comply with a "family plan," the guardian filed a supplemental petition in Kent County requesting termination of parental rights. The respondent moved to transfer the case to Isabella County, arguing that the child was not "found within" Kent County when the guardian filed the supplemental petition. The Court of Appeals concluded that the referee properly denied the respondent's motion to transfer the case. MCR 3.926(A) states that a child is "found within the county" where the offense against the child occurred or where the child is present. Because the neglect alleged in the original petition occurred in Kent County, the child was properly "found within" Kent County for purposes of the subsequent proceedings. Moreover, MCR 3.926(B)(3) states that a child is not a resident of a county in which he or she has been placed "by court order or by placement by a public or private agency." In addition, under MCR 3.926(B)(2), the referee properly considered ongoing child protective proceedings in Kent County involving the respondent's other children when denying the motion to transfer the case.

CHAPTER 18

Hearings on Termination of Parental Rights

18.24 Termination on the Grounds of Failure to Provide Proper Care or Custody—§19b(3)(g)

Case Law

Insert the following text on page 408 after the case summary of *In re Trejo Minors:*

- *In re Zimmerman,* ___ Mich App ___ (2004)

Where the respondent-mother maintained suitable employment and separated from an abusive boyfriend but only "minimally complied" with the provisions of a "family plan" (guardianship plan) regarding parenting time, attending parenting classes, obtaining a psychological evaluation, undergoing counseling for depression, and obtaining new housing, the court properly terminated her parental rights.

CHAPTER 21

Appeals

21.4 Filing Requirements

Effective November 2, 2004, MCR 7.204(A)(1)(c) was amended. The phrase "under the Juvenile Code" was added to the first sentence in order to clarify "that the 14-day time limit for seeking an appeal from an order terminating parental rights or entry of an order denying postjudgment relief from an order terminating parental rights is limited to appeals from orders entered under the Juvenile Code." Staff Comment to Administrative Order 2004-43.

In the May 2004 update, replace the quotation of MCR 7.204(A)(1)(c) with the following:

> "(c) 14 days after entry of an order of the family division of the circuit court terminating parental rights under the Juvenile Code, or entry of an order denying a motion for new trial, rehearing, reconsideration, or other postjudgment relief from an order terminating parental rights, if the motion was filed within the initial 14-day appeal period or within further time the trial court may have allowed during that period; or"

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CHAPTER 5

Notice & Time Requirements

5.7 Special Notice Provisions for Incarcerated Parties

Near the middle of page 140, after the quotation of MCR 2.004(A)(1)–(2), insert the following text:

Applicability.

MCR 2.004(A) states that it applies to one of the specifically enumerated actions "in which a party is incarcerated under the jurisdiction of the Department of Corrections." In *In re Davis*, ___ Mich App ___, ___ (2004), the Court indicated that "Department of Corrections" refers only to the Michigan Department of Corrections. Therefore, MCR 2.004 does not apply to parties incarcerated in another state who are not subject to the jurisdiction of the Michigan Department of Corrections.

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CHAPTER 2

Reporting & Investigating Suspected Child Abuse & Neglect

2.7 Investigation and Referral Requirements

Insert the following text at the top of page 30, immediately after the first paragraph:

When the FIA interviews a person concerning alleged abuse or neglect, the FIA is required to provide that person with specific information. MCL 722.628(2),* in relevant part, states:

*Effective July 8, 2004. See 2004 PA 195.

> "In the course of an investigation, at the time that a department investigator contacts an individual about whom a report has been made under this act or contacts an individual responsible for the health or welfare of a child about whom a report has been made under this act, the department investigator shall advise that individual of the department investigator's name, whom the department investigator represents, and the specific complaints or allegations made against the individual. The department shall ensure that its policies, procedures, and administrative rules ensure compliance with the provisions of this act."

CHAPTER 2

Reporting & Investigating Suspected Child Abuse & Neglect

2.15 Constitutional Requirements for Reporting and Investigating Suspected Child Abuse or Neglect

B. Investigating Suspected Child Abuse or Neglect

Near the top of page 38 before the paragraph beginning "***Miranda warnings,***" insert the following text:

MCL 722.628(17)* requires that all FIA employees involved in investigating child abuse or neglect cases be trained in "the legal duties to protect the state and federal constitutional and statutory rights of children and families from the initial contact of an investigation through the time services are provided."

*Effective July 8, 2004, 2004 PA 195.

CHAPTER 11

Common Evidentiary Issues in Child Protective Proceedings

11.11 Expert Testimony in Child Protective Proceedings

Insert the following text near the middle of page 290, before the paragraph beginning "MRE 703":

The Michigan Supreme Court in *Gilbert v DaimlerChrysler Corp*, ___ Mich ___, ___ (2004), reiterated the trial court's gatekeeper responsibility in the admission of expert testimony under amended MRE 702. The Court stated:

> "MRE 702 has [] been amended explicitly to incorporate *Daubert's** standards of reliability. But this modification of MRE 702 changes only the factors that a court may consider in determining whether expert opinion evidence is admissible. It has not altered the court's fundamental duty of ensuring that *all* expert opinion testimony–regardless of whether the testimony is based on 'novel'[52] science–is reliable.
>
> ---
>
> [52] See, e.g., *People v Young*, 418 Mich 1, 24; 340 NW2d 805 (1983). Because the court's gatekeeper role is mandated by MRE 702, rather than *Davis-Frye*, the question whether *Davis-Frye* is applicable to evidence that is not 'novel' has no bearing on whether the court's gatekeeper responsibilities extend to such evidence. These responsibilities are mandated by MRE 702 irrespective of whether proffered evidence is 'novel.' . . ."
>
> ---
>
> *Gilbert, supra* at ___.

**Daubert v Merrell Dow Pharmaceuticals, Inc,* 509 US 579 (1993).

The Court also indicated that the trial court must focus its MRE 702 inquiry on the data underlying the expert opinion and must evaluate the extent to which the expert extrapolates from that data in a manner consistent with *Daubert v Merrell Dow Pharmaceuticals, Inc,* 509 US 579 (1993). *Gilbert, supra* at ___.

CHAPTER 14

Paying the Costs of Child Protective Proceedings

14.1 Federal, State, and County Sources of Funding

Federal foster care maintenance payments under Title IV-E.

Insert the following text near the middle of page 333 before the boldface text beginning "**Except as otherwise provided by law . . .**":

*See 2004 PA 193.

Effective July 8, 2004, MCL 400.115b* was amended to provide that if the FIA is making state or federally funded foster care maintenance payments for a child that is either under the supervision of the FIA or has been committed to the FIA, all rights to current, past due, and future child support are assigned to the FIA while the child is receiving or benefiting from those payments. MCL 400.115b(5)–(6) state:

> "(5) All rights to current, past due, and future support payable on behalf of a child committed to or under the supervision of the [FIA] and for whom the [FIA] is making state or federally funded foster care maintenance payments are assigned to the [FIA] while the child is receiving or benefiting from those payments. When the [FIA] ceases making foster care maintenance payments for the child, both of the following apply:
>
> > "(a) Past due support that accrued under the assignment remains assigned to the [FIA].
> >
> > "(b) The assignment of current and future support rights to the [FIA] ceases.
>
> "(6) The maximum amount of support the [FIA] may retain to reimburse the state, the federal government, or both for the cost of care shall not exceed the amount of foster care maintenance payments made from state or federal money, or both."

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CHAPTER 5

Notice & Time Requirements

5.3 Issuance and Service of Summons

B. Manner of Service of Summons

Insert the following case summary on the bottom of page 131 after the summary of *In re Mayfield*:

In *In re Zaherniak*, ___ Mich App ___, ___ (2004), the Court of Appeals discussed an apparent conflict between MCR 3.920 and MCL 712A.13. MCR 3.920(B)(4)(b) provides that the court may find "on the basis of testimony or a motion and affidavit" that personal service cannot be made, and the court may then order substitute service. MCL 712A.13 also provides for substitute service; however, MCL 712A.13 does not require the court to make its findings based upon testimony or an affidavit. In *Zaherniak*, the petitioner was unable to personally serve the respondent with notice of the hearing on termination of parental rights. At a hearing in the respondent's absence, the trial court suggested that the petitioner file an affidavit of diligent effort, and the court would order service by publication. The petitioner filed a motion for alternate service without a proper affidavit. The court did not take any testimony regarding the motion before issuing its order for service by publication. After publication, termination proceedings were held and the respondent's parental rights were terminated. The respondent appealed, claiming that the court improperly allowed service by publication and therefore lacked jurisdiction over her. The respondent argued that the petitioner's motion was defective because it failed to specify facts to support an order for substitute service.

The Court of Appeals held that MCL 712A.13, not MCR 3.920, controls the determination of whether a court has established jurisdiction over a respondent:

> "We believe that MCL 712A.13 reflects our Legislature's policy considerations concerning the necessary requirements for obtaining jurisdiction over a parent or guardian of a juvenile. Because the issue of service is a jurisdictional one, the statutory provision governs. The plain language of the statute contains no specific requirements concerning what types of evidence a court must consider in determining whether substitute service is indicated, or the form in which the evidence must be received. By its silence, MCL 712A.13 permits a court to evaluate evidence other than testimony or a motion and affidavit when determining whether notice can be made by substituted service. We believe that the recently amended court rule requirements now found in MCR 3.920(B)(4)(b) are restrictions affecting jurisdiction in matters that are usually time-sensitive and for which the Legislature's policy is to seek prompt resolution for the sake of the juvenile involved, and as such conflict with MCL 712A.13. Therefore, the statute prevails."

The Court of Appeals concluded that the trial court did not err in relying upon the petitioner's motion for alternate service and documents in the court file regarding previous failures to serve the respondent.

CHAPTER 14

Paying the Costs of Child Protective Proceedings

14.2 Orders for Reimbursement of the Costs of Care or Services When a Child Is Placed Outside the Home

On page 334, insert the following text after the first paragraph in this section:

A stepfather does not qualify as a "custodian" for the purposes of ordering reimbursement pursuant to MCL 712A.18(2). In *In re Hudson*, ___ Mich App ___, ___ (2004), a stepfather was ordered to pay the cost of his stepdaughter's care and legal representation. The Probate Code does not define "custodian." However, the Court of Appeals noted that "custodian" has a specific legal meaning as provided in the Michigan Uniform Transfer to Minors Act, MCL 554.521 et seq. Under that act, "one does not become a 'custodian' without acquiring, under clearly articulated circumstances, legal possession of a minor's property which is then held in trust for the child." *Hudson, supra* at ___. The Court concluded that because the stepfather was not a financial 'custodian' as specifically defined in the Michigan Uniform Transfer to Minors Act, he could not be ordered to reimburse the court for the juvenile's cost of care or out-of-home placement.

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CHAPTER 11

Common Evidentiary Issues in Child Protective Proceedings

11.5 Exceptions to the "Hearsay Rule" Commonly Relied Upon in Child Protective Proceedings

D. Statements of Existing Mental, Emotional, or Physical Condition

Insert the following case summary on page 264, immediately before subsection (E):

A declarant's out-of-court statements of memory or belief when the statements are offered to prove the fact remembered or believed are specifically excluded from the hearsay exception described in MRE 803(3). *People v Moorer*, ___ Mich App ___, ___ (2004). In *Moorer*, the defendant argued against the admission of testimony from witnesses who claimed that the victim told them that he "had a confrontation with defendant; that defendant wanted to kill [the victim]; that defendant had threatened to kill [the victim]; that defendant said he had a bullet for [the victim]; and that defendant was looking for [the victim] with a gun." *Moorer, supra* at ___.

The Court of Appeals determined that the trial court had improperly admitted several witnesses' testimony about the victim's out-of-court statements because the statements went beyond MRE 803(3)'s exception for statements concerning a declarant's "then existing mental, emotional, or physical condition." *Moorer, supra* at ___. The Court concluded that the challenged testimony was inadmissible hearsay because it involved the *defendant's* past or presumed future actions rather than describing the *declarant-victim's* intentions or plans. *Moorer, supra* at ___.

CHAPTER 11

Common Evidentiary Issues in Child Protective Proceedings

11.5 Exceptions to the "Hearsay Rule" Commonly Relied Upon in Child Protective Proceedings

I. Residual Exceptions to the "Hearsay Rule"

Insert the following case summary on page 275 before the summary of *People v Lee*, 243 Mich App 163 (2000):

- *People v Geno,* ___ Mich App ___, ___-___ (2004):

Defendant was convicted of first-degree criminal sexual conduct for sexually penetrating the defendant's girlfriend's two-year-old daughter. During an assessment and interview at a children's assessment center, the child asked the interviewer to go to the bathroom with her, where the interviewer observed blood in the child's pull-up. The interviewer asked the child if she "had an owie," and the child answered, "yes, Dale [defendant] hurts me here" and pointed to her vaginal area. The defendant argued that the child's statement was improperly admitted under MRE 803(24). The Court of Appeals held that it was not error to admit the child's statement because the statement was not covered by any other MRE 803 hearsay exception, and the statement met the four requirements outlined in *People v Katt,* 468 Mich 272 (2003).

The defendant also argued that pursuant to *Crawford v Washington*, 541 US ___ (2004), the defendant's right to confrontation was violated by the admission of the victim's statements. The Court of Appeals stated:

> "We recognize that with respect to 'testimonial evidence,' *Crawford* has overruled the holding of *Ohio v Roberts*, 448 US 56; 100 S Ct 2531; 65 L Ed 2d 597 (1980), permitting introduction of an unavailable witness's statement – despite the defendant's inability to confront the declarant – if the statement bears adequate indicia of reliability, i.e., it falls within a 'firmly rooted hearsay exception' or it bears 'particularized guarantees of trustworthiness.' *Roberts, supra* at 66. However, we conclude that the child's statement did not constitute testimonial evidence under *Crawford*, and therefore was not barred by the Confrontation Clause. . . .
>
> "Therefore, we conclude, at least with respect to nontestimonial evidence such as the child's statement in this case, that the reliability factors of *People v Lee*, 243 Mich App 163, 178; 622 NW2d 71 (2000), are an appropriate means of determining

admissibility. . . . We therefore conclude that defendant has failed to establish plain, outcome-determinative error with respect to his Confrontation Clause claim."

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CHAPTER 5

Notice & Time Requirements

5.1 Service of Process in Child Protective Proceedings

Presumption of legitimacy.

On pages 124-125, delete the case summary of *In re Montgomery* and the **Note** regarding *In re KH.* In *KH,* the Michigan Supreme Court overruled *Montgomery* insofar as it held that a court may make a paternity determination during a child protective proceeding.

CHAPTER 5

Notice & Time Requirements

5.2 Establishing Paternity

Procedure for establishing paternity in a child protective proceeding.

At the bottom of page 126, insert the following case summary before the summary of the *CAW* case:

The Supreme Court held that the Michigan Court Rules do not permit a biological father to participate in a child protective proceeding where a legal father exists. *In re KH,* ___ Mich ___, ___ (2004), overruling *In re Montgomery*, 185 Mich App 341 (1990). In *KH*, the FIA filed a petition to terminate the parental rights of Tina and Richard Jefferson to four children. During a bench trial, the parties testified that Tina and Richard were legally married during each child's conception and birth and were still married at the time of trial. Based on DNA test results admitted at trial, the referee determined that another man, Lagrone, was the biological father of three of the children. *KH, supra* at ___. Lagrone then filed a motion seeking a ruling that Richard Jefferson was not the father of the three children. Tina Jefferson objected to the motion, arguing that as a putative father Lagrone did not have standing to establish paternity in a child protective proceeding. The trial court granted Lagrone's motion to establish paternity. The children's lawyer-guardian ad litem appealed. *KH, supra* at ___.

MCR 5.921(D)* permitted a putative father to be identified and given notice of court hearings only where the minor child had no father. Therefore, if a father already existed pursuant to MCR 5.903(A)(4), a putative father could not be identified or given notice. *KH, supra* at ___.

*Now MCR 3.921(C). Although *KH* was decided under the court rules in effect prior to May 1, 2003, the Court notes that the analysis and outcome of the case are the same under the current court rules. *KH, supra* at ___, n 1.

Because Tina and Richard were legally married at the time of each minor's conception and birth, the children had a legal father and no other man could be identified as a putative father unless the minors were determined to be "born out of wedlock." MCR 5.903(A)(1)* defined a "child born out of wedlock" as a child "conceived and born to a woman who is unmarried from the conception to the birth of the child, or a child determined by judicial notice or otherwise to have been conceived or born during a marriage but who is not the issue of that marriage." *KH, supra* at ___.

*The definition of "child born out of wedlock" was incorporated into the definition of "father" in MCR 3.903(A)(7)(a).

Lagrone argued that the three children were judicially determined to be "born out of wedlock" when the referee determined that Lagrone was the biological father of the children. The Court looked to the Paternity Act as the legislatively provided mechanism for establishing paternity. The Court concluded:

> "[A] determination that a child is born out of wedlock must be made by the court before a biological father may be identified in a child protective proceeding.
>
> "Under either version of the court rule, MCR 5.921(D) or MCR 3.921(C), a prior out-of-wedlock determination does not confer *any type* of standing on a putative father. Rather, the rules give the trial court the discretion to provide notice to a putative father, and permit him to establish that he is the biological father by a preponderance of the evidence. Once proved, the biological father is provided fourteen days to establish a legally recognized paternal relationship.
>
> "*Nothing in the prior or amended court rules permits a paternity determination to be made in the midst of a child protective proceeding.* Rather, once a putative father is identified in accordance with the court rules, the impetus is clearly placed on the putative father to secure his legal relationship with the child as provided by law. If the legal relationship is not established, a biological father may not be named as a respondent on a termination petition, the genetic relationship notwithstanding." [Emphasis added.] *KH, supra* at ___.

In *KH*, the record contained evidence that the presumption of legitimacy had been rebutted. During the course of the proceedings, Tina and Richard Jefferson testified that Richard was not the children's father. Richard also testified that he did not wish to participate in the proceedings, which, the Court concluded could reasonably be construed as an indication that Richard was prepared to renounce the benefit afforded to him by the presumption of legitimacy and to not claim the children as his own. *KH, supra* at ___. However, since the trial court did not make a finding on whether the presumption of legitimacy was rebutted, the Court remanded to the trial court for such a determination. The Court concluded:

"If Mr. Lagrone had been . . . identified[as a putative father], and elected to establish paternity as permitted by MCR 5.921(D)(2)(b), the out-of-wedlock determination made in the child protective proceeding could serve as the prior determination needed to pursue a claim under the Paternity Act. *Girard* [*v Wagenmaker*, 437 Mich 231 (1991)].

"Accordingly, this case is remanded to the trial court for such a determination. If the court finds that the presumption of legitimacy was rebutted by clear and convincing evidence from either parent that the children are not the issue of the marriage, the court may take further action in accordance with MCR 5.921(D)." *KH, supra* at ___.

CHAPTER 7

Preliminary Hearings

7.4 Respondents' Right to Counsel

Effective May 1, 2004, MCR 3.977(I) was amended. Beginning near the middle of page 180, replace the quote of MCR 3.977(I) with the following quote:

"(I) Respondent's Rights Following Termination.

"(1) *Advice*. Immediately after entry of an order terminating parental rights, the court shall advise the respondent parent orally or in writing that:

(a) The respondent is entitled to appellate review of the order.

(b) If the respondent is financially unable to provide an attorney to perfect an appeal, the court will appoint an attorney and furnish the attorney with the portions of the transcript and record the attorney requires to appeal.

(c) A request for the assistance of an attorney must be made within 14 days after notice of the order is given or an order is entered denying a timely filed postjudgment motion. The court must then give a form to the respondent with the instructions (to be repeated on the form) that if the respondent desires the appointment of an attorney, the form must be returned to the court within the required period (to be stated on the form).

(d) The respondent has the right to file a denial of release of identifying information, a revocation of a denial of release, and to keep current the respondent's name and address as provided in MCL 710.27.

"(2) *Appointment of Attorney.*

(a) If a request is timely filed and the court finds that the respondent is financially unable to provide an attorney, the court shall appoint an attorney within 14 days after the respondent's request is filed. The chief judge of the court shall bear primary responsibility for ensuring that the appointment is made within the deadline stated in this rule.

(b) In a case involving the termination of parental rights, the order described in (I)(2) and (3) must be entered on a

> form approved by the State Court Administrator's Office, entitled "Claim of Appeal and Order Appointing Counsel," and the court must immediately send to the Court of Appeals a copy of the Claim of Appeal and Order Appointing Counsel, a copy of the judgment or order being appealed, and a copy of the complete register of actions in the case. The court must also file in the Court of Appeals proof of having made service of the Claim of Appeal and Order Appointing Counsel on the respondent(s), appointed counsel for the respondent(s), the court reporter(s)/ recorder(s), petitioner, the prosecuting attorney, the lawyer-guardian ad litem for the child(ren) under MCL 712A.13a(1)(f), and the guardian ad litem or attorney (if any) for the child(ren). Entry of the order by the trial court pursuant to this subrule constitutes a timely filed claim of appeal for the purposes of MCR 7.204.
>
> "(3) *Transcripts*. If the court finds that the respondent is financially unable to pay for the preparation of transcripts for appeal, the court must order transcripts prepared at public expense."

The relevant SCAO forms have been amended to conform to the amended court rule. See SCAO Form JC 44 and JC 84. For further information, see SCAO Administrative Memorandum 2004-02, April 1, 2004.

CHAPTER 18

Hearings on Termination of Parental Rights

18.13 Required Advice of Rights

Effective May 1, 2004, MCR 3.977(I) was amended. Beginning near the bottom of page 389, replace the quote of MCR 3.977(I) with the following quote:

"(I) Respondent's Rights Following Termination.

"(1) *Advice*. Immediately after entry of an order terminating parental rights, the court shall advise the respondent parent orally or in writing that:

(a) The respondent is entitled to appellate review of the order.

(b) If the respondent is financially unable to provide an attorney to perfect an appeal, the court will appoint an attorney and furnish the attorney with the portions of the transcript and record the attorney requires to appeal.

(c) A request for the assistance of an attorney must be made within 14 days after notice of the order is given or an order is entered denying a timely filed postjudgment motion. The court must then give a form to the respondent with the instructions (to be repeated on the form) that if the respondent desires the appointment of an attorney, the form must be returned to the court within the required period (to be stated on the form).

(d) The respondent has the right to file a denial of release of identifying information, a revocation of a denial of release, and to keep current the respondent's name and address as provided in MCL 710.27.

"(2) *Appointment of Attorney.*

(a) If a request is timely filed and the court finds that the respondent is financially unable to provide an attorney, the court shall appoint an attorney within 14 days after the respondent's request is filed. The chief judge of the court shall bear primary responsibility for ensuring that the appointment is made within the deadline stated in this rule.

(b) In a case involving the termination of parental rights, the order described in (I)(2) and (3) must be entered on a

> form approved by the State Court Administrator's Office, entitled "Claim of Appeal and Order Appointing Counsel," and the court must immediately send to the Court of Appeals a copy of the Claim of Appeal and Order Appointing Counsel, a copy of the judgment or order being appealed, and a copy of the complete register of actions in the case. The court must also file in the Court of Appeals proof of having made service of the Claim of Appeal and Order Appointing Counsel on the respondent(s), appointed counsel for the respondent(s), the court reporter(s)/ recorder(s), petitioner, the prosecuting attorney, the lawyer-guardian ad litem for the child(ren) under MCL 712A.13a(1)(f), and the guardian ad litem or attorney (if any) for the child(ren). Entry of the order by the trial court pursuant to this subrule constitutes a timely filed claim of appeal for the purposes of MCR 7.204.
>
> "(3) *Transcripts*. If the court finds that the respondent is financially unable to pay for the preparation of transcripts for appeal, the court must order transcripts prepared at public expense."

The relevant SCAO forms have been amended to conform to the amended court rule. See SCAO Form JC 44 and JC 84. For further information, see SCAO Administrative Memorandum 2004-02, April 1, 2004.

CHAPTER 21

Appeals

21.4 Filing Requirements

Effective May 1, 2004, MCR 7.204(A)(1) was amended. Replace the quotation of MCR 7.204(A)(1) near the middle of page 451, beginning with the following quote:

"(1) An appeal of right in a civil action must be taken within

(a) 21 days after entry of the judgment or order appealed from;

(b) 21 days after the entry of an order denying a motion for new trial, a motion for rehearing or reconsideration, or a motion for other postjudgment relief, if the motion was filed within the initial 21-day appeal period or within further time the trial court may have allowed during that 21-day period;

(c) 14 days after entry of an order of the family division of the circuit court terminating parental rights, or entry of an order denying a motion for new trial, rehearing, reconsideration, or other postjudgment relief from an order terminating parental rights, if the motion was filed within the initial 14-day appeal period or within further time the trial court may have allowed during that period; or

(d) another time provided by law.

"If a party in a civil action is entitled to the appointment of an attorney and requests the appointment within 14 days after the final judgment or order, the 14-day period for the taking of an appeal or the filing of a postjudgment motion begins to run from the entry of an order appointing or denying the appointment of an attorney. If a timely postjudgment motion is filed before a request for appellate counsel, the party may request counsel within 14 days after the decision on the motion."

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CHAPTER 5

Notice & Time Requirements

5.4 Notice of Hearings in Child Protective Proceedings

Initial disposition hearings and review hearings.

Effective February 25, 2004, MCR 3.975(B) was amended. Near the bottom of page 134, replace the quote of MCR 3.975(B) with the following text:

> "(B) *Notice*. The court shall ensure that written notice of a dispositional review hearing is given to the appropriate persons in accordance with MCR[] 3.920 and MCR 3.921(B)(2). The notice must inform the parties of their opportunity to participate in the hearing and that any information they wish to provide should be submitted in advance to the court, the agency, the lawyer-guardian ad litem for the child, or an attorney for one of the parties."

Permanency planning hearings and hearings on termination of parental rights.

Effective February 25, 2004, MCR 3.976(C) was amended. On page 135, replace the quote of MCR 3.976(C) with the following quote and insert the additional text:

> "(C) *Notice*. Written notice of a permanency planning hearing must be given as provided in MCR 3.920 and MCR 3.921(B)(2). The notice must include a brief statement of the purpose of the hearing, and must include a notice that the hearing may result in further proceedings to terminate parental rights. The notice must inform the parties of their opportunity to participate in the hearing and that any information they wish to provide should be submitted in advance to the court, the agency, the lawyer-guardian ad litem for the child, or an attorney for one of the parties."

Effective February 25, 2004, the Supreme Court also amended MCR 3.977(C). MCR 3.977(C), governing termination of parental rights, states:

> "(C) *Notice; Priority.*
>
> (1) Notice must be given as provided in MCR 3.920 and MCR 3.921(B)(3).
>
> (2) Hearings on petitions seeking termination of parental rights shall be given the highest possible priority consistent with the orderly conduct of the court's caseload."

CHAPTER 7

Preliminary Hearings

7.5 Appointment of Lawyer-Guardians Ad Litem for Children

On page 186, replace the first full paragraph and the quote of MCR 3.915(B)(2)(a) with the following text:

The court rule governing appointment of lawyer-guardians ad litem, MCR 3.915(B)(2), references the statute and requires that the court appoint a lawyer-guardian ad litem for the preliminary hearing. Effective February 25, 2004, MCR 3.915 was amended. Amended MCR 3.915(B)(2)(a) requires that the court ask the lawyer-guardian ad litem, at each hearing, if he or she has met with the child as required by MCL 712A.17d(1)(d), and if the lawyer-guardian ad litem has not met with the child, he or she must state the reasons for failing to do so on the record. The Staff Comment on this amendment states that it "is designed to enforce the statutory requirement in MCL 712A.17d that lawyers-guardians ad litem for children meet with their clients before each hearing." MCR 3.915(B)(2)(a) states:

> "(2) **Child.**
>
> > (a) The court must appoint a lawyer-guardian ad litem to represent the child at every hearing, including the preliminary hearing. The child may not waive the assistance of a lawyer-guardian ad litem. The duties of the lawyer-guardian ad litem are as provided by MCL 712A.17d. At each hearing, the court shall inquire whether the lawyer-guardian ad litem has met with the child, as required by MCL 712A.17d(1)(d) and if the attorney has not met with the child, the court shall require the lawyer-guardian ad litem to state, on the record, his or her reasons for failing to do so.

MCR 3.915(D) was also amended. The amended rule allows another attorney to temporarily substitute for the lawyer-guardian ad litem in certain circumstances. On page 186, replace the quote of MCR 3.915(D) with the following text:

> "(D) *Duration.*
>
> > (1) An attorney retained by a party may withdraw only on order of the court.
> >
> > (2) An attorney or lawyer-guardian ad litem appointed by the court to represent a party shall serve until discharged by

the court. The court may permit another attorney to temporarily substitute for the child's lawyer-guardian ad litem at a hearing, if that would prevent the hearing from being adjourned, or for other good cause. Such a substitute attorney must be familiar with the case and, for hearings other than a preliminary hearing or emergency removal hearing, must review the agency case file and consult with the foster parents and caseworker before the hearing unless the child's lawyer-guardian ad litem has done so and communicated that information to the substitute attorney. The court shall inquire on the record whether the attorneys have complied with the requirements of this subrule."

CHAPTER 7
Preliminary Hearings

7.10 Required Procedures at Preliminary Hearings

Insert the following new subsections on page 193 before Section 7.11:

I. Inquiring About the Father's Identity

Effective February 25, 2004, if the child's father has not been identified, the court must ask the mother about the identity and whereabouts of the father. MCR 3.965(B)(13).

J. Inquiring About Relative Caregivers

"The court must inquire of the parent, guardian, or legal custodian regarding the identity of relatives of the child who might be available to provide care." MCR 3.965(B)(13).

CHAPTER 8

Placement of a Child

8.6 Required Advice Concerning Initial Service Plans

Effective February 25, 2004, MCR 3.965(E) was amended. Beginning on the bottom of page 210, replace the quote of MCR 3.965(E) with the following text:

> "(E) *Advice; Initial Service Plan*. If placement is ordered, the court must, orally or in writing, inform the parties:
>
> > "(1) that the agency designated to care and supervise the child will prepare an initial service plan no later than 30 days after the placement;
> >
> > "(2) that participation in the initial service plan is voluntary unless otherwise ordered by the court;
> >
> > "(3) that the general elements of an initial service plan include:
> >
> > > (a) the background of the child and the family,
> > >
> > > (b) an evaluation of the experiences and problems of the child,
> > >
> > > (c) a projection of the expected length of stay in foster care, and
> > >
> > > (d) an identification of specific goals and projected time frames for meeting the goals; and
> >
> > "(4) that, on motion of a party, the court will review the initial service plan and may modify the plan if it is in the best interests of the child.
>
> "The court shall direct the agency to identify, locate, and consult with relatives to determine if placement with a relative would be in the child's best interests, as required by MCL 722.954a(2). In a case to which MCL 712A.18f(6) applies, the court shall require the agency to provide the name and address of the child's attending physician of record or primary care physician."*

*See Sections 8.2 and 8.11(B) for discussions of MCL 722.954a(2). For a discussion of MCL 712A.18(f)(6), see Section 13.6.

CHAPTER 17

Permanency Planning Hearings

17.3 Time Requirements

Effective February 25, 2004, MCR 3.976(B)(3) was amended. Near the bottom of page 362, replace the quote of MCR 3.976(B)(3) with the following:

> "(3) *Requirement of Annual Permanency Planning Hearings*. During the continuation of foster care, the court must hold permanency planning hearings beginning no later than one year after the initial permanency planning hearing. The interval between permanency planning hearings is within the discretion of the court as appropriate to the circumstances of the case, but must not exceed 12 months. The court may combine the permanency planning hearing with a dispositional review hearing."

CHAPTER 17

Permanency Planning Hearings

17.5 Court's Options Following Permanency Planning Hearings

Second decision: determine whether to initiate proceedings to terminate parental rights.

Effective February 25, 2004, MCR 3.976(E)(2) was amended. Near the bottom of page 368, replace the quote of MCR 3.976(E)(2) with the following:

> "(2) *Continuing Foster Care Pending Determination on Termination of Parental Rights*. If the court determines at a permanency planning hearing that the child should not be returned home, it must order the agency to initiate proceedings to terminate parental rights, unless the agency demonstrates to the court and the court finds that it is clearly not in the best interests of the child to presently begin proceedings to terminate parental rights. The order must specify the time within which the petition must be filed, which may not be more than 42 days after the date of the order."

CHAPTER 18

Hearings on Termination of Parental Rights

In this chapter. . .

Effective February 25, 2004, MCR 3.977 was amended. In the middle of page 374, after the quote of MCR 3.977(A)(1), insert the following text:

MCR 3.977(C)(2) states:

> "Hearings on petitions seeking termination of parental rights shall be given the highest possible priority consistent with the orderly conduct of the court's caseload."

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Update: Child Protective Proceedings Benchbook (Revised Edition)

CHAPTER 11

Common Evidentiary Issues in Child Protective Proceedings

11.9 "Other Acts" Evidence

B. Evidence of Other Crimes, Wrongs, or Acts

Insert the following text on page 288, immediately before the case summary for *People v Daoust*:

The Michigan Supreme Court reversed. *People v Knox,* 469 Mich 502 (2004). The Michigan Supreme Court stated:

> "Although we agree with the Court of Appeals majority's assessment that this matter should be analyzed from the standpoint of whether admission of the contested evidence discussed above constituted plain error affecting defendant's substantial rights, we agree with the dissenting judge that plain error requiring reversal did, in fact, occur." *Id.* at 508.

The court concluded that evidence of the defendant's anger during arguments with the victim's mother was irrelevant to the issue of whether defendant committed the charged acts. The defendant's actions during his arguments with the victim's mother and the acts that caused the victim's death were entirely dissimilar. Although the evidence of the victim's prior injuries was relevant to prove that the fatal injuries were not accidental, there was no evidence that defendant committed the past abuse. Finally, the evidence of the victim's mother's "good character" "improperly undermined defendant's credibility." *Id.* at 512-514. Thus, all of the challenged evidence was admitted improperly to show defendant's bad character and propensity to commit the charged acts. The Court stated:

> "The improper admission of the evidence of [the victim's mother's] good character, like the admission of the evidence of

defendant's anger problems and the improper use of the evidence regarding [the victim's] prior injuries, created far too great a risk of affecting the outcome of the case, given the absence of any direct evidence that defendant committed the acts that resulted in [the victim's] death. Consequently, we reverse the judgment of the Court of Appeals and remand this case to the circuit court for a new trial." *Id.* at 514-515.